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In The

Supreme Court of the United States

OCTOBER TERM 1970

No._____

LAWRENCE A. FRANK and
VERONICA B. FRANK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lawrence A. Frank and Veronica B. Frank respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 29, 1971.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported (Appendix 7). The District Court gave no opinion.

JURISDICTION

The jurisdiction of the District Court for the District of Oregon was founded on *18 USC §3231*. The jurisdic-

tion of the Court of Appeals for the Ninth Circuit was founded upon *28 USC § 1291.*

The judgment of the Court of Appeals was entered on January 29, 1971 (Appendix 9). A timely petition for rehearing was denied on March 2, 1971 (Appendix 10). This petition for certiorari will be filed within 30 days after that date. This Court's jurisdiction is invoked under *28 USC §1254 (1).*

QUESTIONS PRESENTED

1. Whether wilful tax evasion may be established by under-reporting of income in income tax returns in four successive years without any evidence of dishonest practices?

2. Whether a husband who has nothing to do with financial business records kept by his wife except to deliver her summary to the income tax preparer can thereby become liable for wilful tax evasion?

APPLICABLE STATUTE

26 USC §7201. Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioners, husband wife (II, p. 96), were convicted of wilful tax evasion, *26 USC §7201,* of joint income tax returns for 1964, 1965 and 1966.

Petitioners are farmers (II, p. 98) who, in connection with their farming, run a seed cleaning establishment cleaning their own seed and the seed of other farmers (II, pp. 99-100).

Mrs. Frank kept all the books and records by crop years (II, p. 102-103). Payments were entered in crop year notebook (II, p. 135), and then on a yellow ledger sheet (II, p. 103). The accounts were kept in a type of calendar with a pocket for each month (II, p. 105). The income and expenses, and the person dealt with were entered on these yellow ledger sheets every 3 to 6 months (II, pp. 106-107, 134-136-137).

One checking account in their names was kept and all the income was deposited there, but at that time they were not aware of the need for a bank verification system (II, pp. 105-106, 109).

At the end of the year they would take out the yellow ledger sheets, write down the totals of income and expenses, and take them to Attorney Bell who would compute their income taxes (II, p. 108).

The crop year method resulted in entering in 1963 items of income actually received in 1964 and as a result never entered on the yellow ledger sheet (II, pp. 110-112, 114, 139). In fact it resulted in their overlooking $500 owed them by a seed grower (II, pp. 110, 127, 141). This method likewise infected the 1965 and 1966 income. Mrs. Frank put the invoices noting income or expenses in the front of the book until entered on the yellow ledger sheet, and then put them in the back of the book (II, pp. 117-118, 138).

Mrs. Frank never thought about checking any payments made for a preceding crop year and didn't use the income checks to record the income (II, p. 141). Mr. Frank didn't supervise Mrs. Frank's book work (II, p. 142). Now, after the investigation, a CPA set up a system whereby she records by check and reconciles with the bank account (II, p. 142).

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit has decided an important question of Federal law in a way that appears to conflict with applicable decisions of this Court and with the interpretation made by Courts of Appeal for other Circuits.

ARGUMENT

1. *Spies v. United States*, 317 US 492, 499-500 (1943) established the important requirement that the felony of wilful evasion of income tax was not shown merely by proving that the tax return understated the tax due, but some affirmative, dishonest practices were required.

The cases have adhered to this, such as keeping two sets of books, *Wiggins v. United States*, 9 Cir. 64 F2d 950 (1933); making false entries or alterations, *United States v. Lange*, 7 Cir. 161 F2d 699 (1947); destruction of records, *Yoffe v. United States*, 1 Cir. 153 F2d 570 (1946); concealment of assets, *Gendelman v. United States*, 9 Cir. 191 F2d 993 (1951); placing property in another's hands, *Chinn v. United States*, 4 Cir. 228 F2d 151 (1955); using false names on bank accounts, *Elwert v. United States*, 9 Cir. 231 F2d 929 (1956); making false explanations, *United States v. Murray*, 2 Cir. 297 F2d 812 (1962); concealment during investigation, *Barcott*

v. United States, 9 Cir. 169 F2d 929 (1948); deliberate withholding of saleslips from bookkeepers, *Norwitt v. United States*, 9 Cir. 195 F2d 127 (1952); an unaccounted for cash hoard on a modest takehome pay, *Canaday v. United States*, 8 Cir. 354 F2d 849 (1966); a business run without any records, *Smith v. United States*, 348 US 147 (1954); a consistent pattern of understating the income by one-half, *Escobar v. United States*, 5 Cir. 388 F2d 661 (1961), and a pattern of excluding income from *all* books and records, *Holland v. United States*, 348 US 121 (1954).

We have none of these here. The Franks had one checking account in their name, and all income went into it (II, p. 105). Books and records were kept reflecting all income (Exh. 10-14, 36, 37, 40b - e, II, pp. 101-126, 131-135. Complete candor and cooperation marked defendants' conduct with the auditing agents (II, pp. 61-63, 65-68, 70-71), and a desire was exhibited to determine and pay the additional tax as quickly as possible (II, p. 69). Only after Mr. Frank was told he was the subject of criminal prosecution, did he engage an attorney (II, p. 71).

This only established inadequate record-keeping, not wilful falsity. *United States v. Pechenik*, 3 Cir. 236 F2d 844, 847 (1956).

The government claims that Mr. Frank "should have known" that he had greater income, but this is not in accord with *Spies*. And a farmer may have a very good living without any taxable income. *cf. Morris v. Commissioner*, 9 BTA 1273, 1275 (1928).

The Court of Appeals for the Ninth Circuit reduces the effectiveness of *Spies* by determining that false tax returns for several years, without any dishonest practice in any year will satisfy the Spies requirements for willfulness. Logically this is the equivalent of multiplying zero by two and getting more than zero. The protection afforded by *Spies* in this perilous area should be maintained.

2. The Court of Appeals has also upheld the ancient fiction of criminal liability of a husband for a wife, because the evidence is uncontradicted that Lawrence A. Frank had no hand in the record keeping that resulted in the false returns. Surely by modern law he has no criminal liability. *United States v. Dege*, 364 US 51 (1960); *Rubenstein v. United States*, 10 Cir. 414 F2d 667 (1954).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted

HOWARD R. LONERGAN,
Counsel for Petitioners

APPENDIX

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 26600
LAWRENCE A. FRANK and VERONICA B. FRANK, *Defendants-Appellants.*	)	

Appeal From the United States District Court
for the District of Oregon

Before: MERRILL and HUFSTEDLER, Circuit Judges, and TUTTLE,* Senior Circuit Judge

PER CURIAM:

Appellants, husband and wife, were convicted of violating 26 U.S.C. § 7201 (willful tax evasion). They attack the sufficiency of the evidence presented below on the issue of the willfulness.

During the years 1964 through 1966, appellants supplied the attorney who prepared their returns with records that omitted substantial items of income. In their return for 1963 (not a subject of the indictment) these exist similar omissions. The inference drawn from these actions constituted the principal evidence of willfulness.

Appellants cite *Spies v. United States* (1943) 317 U.S. 492 for the proposition that the element of willfulness can never be inferred from the omissions in the returns themselves. They are in error. *Spies* holds only

*Hon. Elbert Parr Tuttle, Senior Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

that willfulness is a separate element of the offense of tax evasion and cannot be inferred solely from omissions in a single return. But when the Court had before it a consistent pattern of underreporting and omissions from records, it had no trouble sustaining a jury's finding of willfulness. *(Holland v. United States* (1954) 348 U.S. 121, 139.) For the same reason we have no difficulty here. *(See also Escobar v. United States* (5th Cir.) 388 F2d 661, *cert. denied* (1967) 390 U.S. 1024.)

AFFIRMED.

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 26600
LAWRENCE A. FRANK and VERONICA B. FRANK, *Defendants-Appellants.*	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 29, 1971

ORDER OF COURT OF APPEALS DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 26600
LAWRENCE A. FRANK and VERONICA B. FRANK, *Defendants-Appellants.*	)	ORDER

Before: MERRILL and HUFSTEDLER, Circuit Judges, and TUTTLE,* Senior Circuit Judge

Appellants' petition for rehearing is DENIED.

*Hon. Elbert Parr Tuttle, Senior Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.